

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	CSR 5048-E
)	
Cablevision of Boston, Inc.)	
)	CUID No. MA0182
Petition for Determination of)	
Effective Competition)	
)	
Application for Review)	

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 2002

Released: March 13, 2002

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application filed by the City of Boston (“City” or “Boston”)¹ seeking review of a Memorandum Opinion and Order (“*Order*”) adopted by the Cable Services Bureau (“Bureau”),² granting Cablevision’s Petition seeking a determination that it is subject to local exchange carrier (“LEC”) effective competition in the Boston franchise area. AT&T Broadband (“AT&T”), to which Cablevision had transferred its Boston cable franchise, filed an Opposition to Boston’s Application to which the City filed a Reply.³ As discussed below, the Application for Review is denied.

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act of 1934, as amended, (“Act”) allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.⁴ In the absence of a demonstration to the contrary, cable systems are

¹ The City of Boston concurrently filed a Petition to Stay the Determination of Effective Competition with its Application for Review. Because we address the merits of the Application in this *Order*, we need not address the arguments raised in the Petition for Stay.

² *Cablevision of Boston, Inc.*, 16 FCC Rcd 14056 (CSB July 20, 2001).

³ The Commonwealth of Massachusetts’ Department of Telecommunications & Energy (“DTE”) supports the City’s request for review. DTE states that it is interested in the final determination of this matter because “the decision will impact the outcome of matters pending before our cable division.” See Boston Reply at Exhibit A.

⁴ 47 U.S.C. § 543(a)(4).

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presumed not to be subject to effective competition as defined by the Act.⁵ Cable operators bear the burden of rebutting that presumption and so must provide evidence sufficient to demonstrate that effective competition is present in the franchise area.⁶ Section 623(1)(1)(D) of the Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC⁷ or its affiliate offers comparable video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area.⁸ The Conference Report to the Telecommunications Act of 1996 (“1996 Act”) provides that “[f]or purposes of the [LEC test], ‘offer’ has the same meaning given that term in the Commission’s rules as in effect on the date of enactment of [the 1996 Act].”⁹ In order to establish that the competing LEC service is “offered” in its franchise area, the incumbent operator must show the LEC competitor is physically able to deliver service to potential subscribers, with the addition of no or only minimal investment, in order for a subscriber to receive service; that no regulatory, technical or other impediments to household service exist; and that the LEC is marketing its service so that potential customers are reasonably aware that the LEC’s services may be purchased.¹⁰

3. In its *Order*, the Bureau found that Cablevision had met its burden and that each prong of the LEC effective competition test had been met. First, the Bureau found that Cablevision provided sufficient evidence to demonstrate that RCN is a LEC and that RCN fits the Commission’s definition of a multichannel video programming distributor (“MVPD”).¹¹ Second, the Bureau found that Cablevision submitted sufficient evidence that the programming of RCN is comparable to the programming provided by Cablevision.¹² Third,

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⁵ 47 U.S.C. § 543(1); 47 C.F.R. § 76.906.

⁶ 47 C.F.R. § 76.905; *see also* 47 C.F.R. §§ 76.906 & 76.907.

⁷ The Communications Act defines the term “local exchange carrier” as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a Commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.S.C. § 153(26).

⁸ 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 623(1) is commonly referred to as the “LEC” test.

⁹ H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996) (“Conference Report”); *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”).

¹⁰ 47 C.F.R. § 76.905(e); *Cable Reform Order*, 14 FCC Rcd at 5305.

¹¹ *Order* ¶ 13.

¹² *Id.* ¶ 14.

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the Bureau found that RCN is offering service in Cablevision's franchise area sufficient to demonstrate the presence of effective competition.¹³ The Bureau stated that RCN, formerly operating as an open video system operator, had obtained a 15 year cable franchise with the City of Boston. The Bureau likewise recognized that RCN is contractually committed to serve approximately 90% of Boston within 3 1/2 years of signing the franchise agreement, and to complete its buildout within six years. Finally, based on Cablevision's submission, the Bureau found that RCN's marketing efforts and the press coverage of RCN's construction activity in the local media ensured that potential subscribers were reasonably well aware of RCN's service.¹⁴ Relying upon the evidence produced by Cablevision, the Bureau rejected the City's argument that grant of the operator's Petition was premature.¹⁵

III. DISCUSSION

4. The City argues first that Congress intended the LEC effective competition test to apply only to established local exchange carriers.¹⁶ It states that a LEC, with operational facilities in place, could enter into the multichannel video distribution marketplace in a more rapid manner than an overbuilder, which would need to construct a completely new system. The City asserts that the legislative history of the 1996 Act indicates that Congress intended for the LEC test to apply to regional bell operating companies ("RBOCs"), not overbuilders with "immature systems."¹⁷ AT&T, on the other hand, asserts that the statutory language in Section 623(l)(1)(D) does not distinguish between established LECs and other LECs; thus, under the plain language of the statute, MVPD competition provided by a LEC is all that is required to satisfy the LEC test.¹⁸

5. The City's argument that the LEC test is limited to RBOC video competition is contrary to the conclusions we already have reached in this regard. The City does not argue below or in the instant proceeding that RCN is not a LEC. Rather, the City argues that RCN is not the type of LEC that Congress envisioned in enacting the LEC test. Notwithstanding the disparate legislative statements noted by the City, the clear language of Section 623(l)(1)(D) indicates that the LEC test applies to all local

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¹³ *Id.* ¶ 15.

¹⁴ *Id.* ¶ 16.

¹⁵ *Id.* ¶ 17.

¹⁶ Boston Application at 6.

¹⁷ *Id.* at 8, *citing* statements of Sen. Larry Pressler in 141 Cong. Rec. S7894 (daily ed. June 7, 1995); 141 Cong. Rec. S8243; 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996); 142 Cong. Rec. S688, S689, S693, S699, S703, S710 (daily ed. Feb. 1, 1996) ("telephone companies pose a very highly credible competitive threat because of their specific identities," "their financial strength," and their "staying power.").

¹⁸ AT&T Opposition at 11. AT&T notes that other provisions of the 1996 Act that were enacted simultaneously with the LEC test do make an express distinction between "established" LECs, such as the RBOCs and GTE, and competitive LECs ("CLECs") (*citing* 47 U.S.C. § 251(b)-(c)).

exchange carriers without limitation.¹⁹ We note that, in enacting the LEC test provision, Congress used the term “local exchange carrier” which is defined as “. . . any person that is engaged in the provision of telephone exchange service or access.”²⁰ In using this term in the LEC test, Congress expressly avoided using the more limited term, “incumbent local exchange carrier,” which would have excluded CLECs, such as RCN, from being considered under the LEC test.²¹ Consequently, we have applied the LEC test to all local exchange carriers that offer multichannel video programming, regardless of their size or class.²²

6. The City next asserts that the Bureau misinterpreted our rules relating to whether a LEC offers service in a franchise area for purposes of the LEC test.²³ It states that RCN’s service is not ubiquitous in Boston because it is only available in four out of sixteen Boston neighborhoods. The City further asserts that RCN is not in a position to offer service immediately throughout the franchise area because substantial additional investment is necessary to build out its physical plant. The City claims that RCN’s need to construct a \$250 million system, and to make its operation profitable, poses significant technical and financial impediments to a Boston household wishing to subscribe to RCN’s video services.²⁴

7. The City states that its franchise agreement with RCN anticipated that RCN would pass approximately 90% of all Boston households by the end of 2002.²⁵ The City explains that the build-out schedule was set, however, prior to the last two years’ economic downturn in the telecommunications industry. The City asserts that as capital markets for telecommunications investments contracted, RCN began scaling back its deployment plans. By March 2001, according to the City, RCN had activated cable plant passing only about 35,000 homes, less than half of the 72,444 homes that should have been activated by the end of the previous year and less than 13% of the 265,110 homes in Boston.²⁶ The City contends that the Commission should take these changed circumstances into account in its review process.²⁷

¹⁹ 47 U.S.C. § 543(l)(1)(D).

²⁰ 47 U.S.C. § 153(26).

²¹ 47 U.S.C. § 251(h)(1).

²² See, e.g., *Time Warner Entertainment Co.*, 11 FCC Rcd 17298 (CSB 1996) (Ameritech New Media as LEC video competitor); *Paragon Communications d/b/a Time Warner Communications*, 12 FCC Rcd 20464 (CSB 1997) (GTE as LEC video competitor); *MediaOne of Massachusetts*, 14 FCC Rcd 13855 (CSB 1999) (RCN as LEC competitor); *MediaOne*, 15 FCC Rcd 13287 (CSB 2000) (BellSouth as LEC video competitor); and *Time Warner Entertainment Co.*, 15 FCC Rcd 8152 (CSB 2000) (TSC Television as LEC video competitor).

²³ Boston Application at 10.

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ AT&T argues that the City’s Application is procedurally defective because the City, in violation of the rules, presents new facts and arguments that were not presented to the Bureau for consideration. In light of the Stay requested by the City, it is more efficient for the Commission to consider the issues presented, rather than the Bureau.

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8. AT&T responds that the City's contention that RCN's network must be fully constructed "throughout" the franchise area before effective competition may be found is incorrect. AT&T states that the definition of "offer" in the Commission's rules requires only that the MVPD is physically able to deliver service to potential subscribers, with no, or only minimal, additional investment by the distributor, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the MVPD.²⁸ AT&T argues that the plain language of the definition requires only that service be offered to potential subscribers in the franchise area, not to all subscribers throughout the franchise area. AT&T also maintains that where the LEC has not completed its build-out or rollout, the cable operator need only establish that the LEC "intends to do so within a reasonable period of time."²⁹ AT&T states that the Commission ruled that "[i]f the LEC is franchised, a showing of the coverage and construction obligations in the franchise should be sufficient [to demonstrate effective competition]."³⁰ AT&T argues that Cablevision satisfied this standard in its original Petition.

9. We disagree with the City on this issue. We have said that there is an "expectation that the LEC presence [will] be ubiquitous."³¹ We therefore require that ". . .to support a finding of effective competition under the LEC test, the LEC's service must substantially overlap the incumbent cable operator's service in the franchise area."³² However, the Commission has expressly addressed and rejected claims that the LEC test requires the adoption of a homes-passed or penetration standard.³³ In order to establish the presence of effective competition, a cable operator need not prove that a competing LEC is providing service throughout its service area.³⁴ Instead, if the LEC is franchised, a showing regarding the coverage and construction obligations in the franchise agreement normally is sufficient to satisfy the LEC test. Furthermore, because a LEC's presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out service, we will find the LEC test satisfied:

when the likelihood of impending competition throughout a substantial part of the incumbent cable operator's service area is established, the competitive service is commercially available, and potential subscribers in the franchise area served by the incumbent are reasonably aware that the service is either actually available to them or will be available

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Accordingly, we will consider the new information submitted by the City.

²⁸ AT&T Opposition at 12.

²⁹ *Id.* at 8.

³⁰ *Id.* at 9, citing *Cable Reform Order*, 14 FCC Rcd. at 5305.

³¹ *Id.* at 5302.

³² *Id.* at 5303.

³³ See *Cable Reform Order*, 14 FCC Rcd at 5300-06.

³⁴ *Id.* at 5305.

within a reasonable time.³⁵

We therefore conclude that the Bureau properly applied the offering standard consistent with the LEC test.

10. The City next argues that the Bureau's finding that RCN is "offering service" throughout Boston constitutes an erroneous finding as to an important and material fact.³⁶ The City argues that the Bureau's *Order* wrongly focused on promises and expectations of competitive service, per RCN's franchise agreement, rather than relying on current facts.³⁷ The City asserts that RCN recently stated at a public hearing that it would not meet the build-out requirements contained in its 1999 franchise agreement.³⁸

11. AT&T responds that the Bureau's *Order* is supported by substantial evidence in the record, and the City's claims concerning RCN's future build-out are contradicted by the City's own Application. AT&T asserts that the conclusions the Bureau reached would hold even if the Commission were to entertain the supposed "new" facts proffered by the City. AT&T states, for example, that RCN asserted in its public hearing testimony that it is "fully funded," it has "enough money to build out in the Boston market first," it is "committed to Boston and anxious to do more," and that "[c]ompetition in this marketplace is working."³⁹ AT&T points out that, in contrast to the City's statements that RCN provides service in only four of Boston's 16 neighborhoods, according to Exhibit 2 of the City's own Application, as of March 2001, RCN also was serving residential subscribers in four additional areas: (1) Boston proper; (2) Charlestown; (3) Roxbury; and (4) South Boston.⁴⁰ AT&T asserts that its own independent research of RCN's Boston service area reveals that the overbuilder is providing service in eleven of the City's sixteen neighborhoods.⁴¹ AT&T adds that, according to the latest franchise fee calculation filed by RCN with the Boston Cable Television Division on March 8, 2001, RCN had over 11,000 subscribers in the City.⁴² In its Reply, the City asserts that AT&T omits the fact that in seven of the neighborhoods cited, RCN serves only specific MDUs and is not in a

³⁵ *Id.* (emphasis added).

³⁶ Boston Application at 16.

³⁷ *Id.* at 16-17.

³⁸ See City of Boston Annual Performance Review—RCN BECO LLC: Hearing of March 14, 2001 held at City of Boston Police Headquarters (attached to Boston's Application for Review as Exhibit 1)(“RCN Testimony”).

³⁹ AT&T Opposition at 14, *citing* RCN Testimony at 8, 26, 29, 30, and 39.

⁴⁰ *Id.* at 14, *citing* City of Boston's Application for Review at Exhibit 2.

⁴¹ *Id.* at 15 and Declaration of Steve Driscoll, Director of Commercial Development for AT&T Broadband's Northeast Region (according to AT&T, Driscoll's investigation found that RCN also is serving: (1) Back Bay/Beacon Hill; (2) Central; (3) Charlestown; (4) Fenway/Kenmore Square; (5) Roxbury; (6) South Boston; and (7) South End).

⁴² *Id.* at 16, *citing* Letter from Steve Grossman, Director of Regulatory Affairs, RCN, to Alicia Mathews, Director, Cable Television Division, Massachusetts Department of Telecomm. (Mar. 9, 2001)(Attached as Exhibit 2 to AT&T's Opposition).

position to extend that service to City residents at large.⁴³

12. With regard to this dispute, the City has suggested in its Application that it was incumbent on the Bureau to ask the parties to refresh the record.⁴⁴ AT&T counters that the City's criticism of the Bureau for failing to solicit a factual update from the parties is misplaced. AT&T asserts that it is the responsibility of the parties, not the Bureau, to keep the record current.⁴⁵ The City responds that, given the nationwide conditions of the telecommunications market to which the Bureau was "doubtless well aware," it was arbitrary and capricious to act on stale pleadings.⁴⁶

13. We disagree that the Bureau erred by not requesting that the parties update the record. To the extent new evidence was available that it was believed would impact the decision, the burden was on the parties to introduce that evidence.⁴⁷ The City had every opportunity to update the record, but failed to do so prior to the issuance of the Bureau's decision.⁴⁸

14. The City has failed to demonstrate that the new evidence would have required the Bureau to reach a different conclusion in this matter. The statements made by RCN earlier this year do not contradict the fact that the company is offering competitive cable service in the Boston franchise area. To the contrary, RCN's testimony supports the Bureau's conclusion that RCN intends to build out its system to serve the entire city of Boston, albeit at a slower pace than it originally intended. The franchise fee report presented by AT&T also demonstrates that RCN has over 11,000 subscribers throughout the franchise area. Although certain areas in some of the neighborhoods have competitive cable service before others, this situation does not detract from the fact that RCN is providing service substantially overlapping the service provided by AT&T. As for the City's assertion concerning service to MDUs, there is no indication in the record or elsewhere that RCN will not build out and serve the neighborhoods in which such buildings are located. The new facts presented here, coupled with the evidence provided to the Bureau, fully support the original finding that LEC effective competition is present in the franchise area.

15. The City also argues that the Bureau arbitrarily relied upon information from trade press accounts and RCN press statements, not found in the pleadings, to support its finding of effective competition.⁴⁹ AT&T argues that none of the press releases/reports cited by the Bureau were necessary

⁴³ Boston Reply at 3.

⁴⁴ Boston Application at 20.

⁴⁵ AT&T Opposition at 16.

⁴⁶ Boston Reply at 3.

⁴⁷ See 47 C.F.R. § 1.65 (applicant responsible for continuing accuracy and completeness of information furnished in pending application); see also *In re Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period*, MO&O, 8 FCC Rcd 5485 at ¶ 39 (1993) ("it is not the Commission's responsibility to make a party's case," it is the parties' "obligation to fully develop the record").

⁴⁸ We note that Cablevision had, on its own motion, filed a pleading to update the record in this proceeding in 1999.

⁴⁹ Boston Reply at 18.

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because there was substantial evidence in the record to support the Bureau's findings.

16. The City has not shown that the non-record evidence presented any significant information not already reflected in the existing case record. Nevertheless, we agree with the City that effective competition decisions should be based on the facts and information contained in the record. Considering the facts of this matter without considering the non-record information, we find that the evidence of record is sufficient to fully support the Bureau's decision. The facts of record relating to the operations of RCN in Boston, including the facts regarding its franchise, franchise obligations, service, ongoing construction, and subscriber growth,⁵⁰ demonstrate that LEC effective competition is present in the franchise area. The City had a full and fair opportunity to comment on this evidence before the Bureau rendered its decision. Thus, the City's allegations do not persuade us that the record needs to be reopened or that any party was denied its right to fairly participate in this matter. Based on the record, including the pleadings and evidence now before us, we have no reason to disagree with the Bureau's finding of effective competition.

17. Finally, the City contends that the Commission's reliance on future build-out promises is inappropriate in the current telecommunications environment.⁵¹ It requests that the Commission clarify that when the LEC test is applied to any provider that does not already have a built-out system in place, commitments to build will not be accepted without a demonstration of actual construction and the actual number of homes activated. In particular, the City posits that if a franchise requires construction progress reports, up-to-date editions of these reports should be examined before a decision is reached, and press releases and news stories alone should be insufficient.⁵² AT&T argues that the City's claims are collateral attacks on the Commission's rules and that such criticism is impermissible because "[t]he Commission's application for review process is not intended to revisit issues resolved in its rulemaking proceedings."⁵³

18. We find that the Bureau, in reaching its conclusions, appropriately relied upon the statements and decisions made by the Commission regarding the application of the LEC effective competition test. As stated above, an incumbent cable operator is permitted to include, in its effective competition pleading, evidence concerning its competitor's future coverage and construction obligations.⁵⁴ Cablevision included such information in its pleadings, and the Bureau correctly relied upon that information in making its determination.

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⁵⁰ See Cablevision's Petition for Determination of Effective Competition at Exhibits 1,2, 7, 9, 12, and 17; *see also*, Cablevision's Supplement to its Petition for Determination of Effective Competition, generally, and the RCN franchise agreement with the City of Boston attached as an Exhibit to that Supplement.

⁵¹ Boston Application at 22.

⁵² *Id.*

⁵³ AT&T Opposition at 4, *citing In Re Digital Broadcasting*, 12 FCC Rcd 20764 (1997).

⁵⁴ *Cable Reform Order* at 5305.

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED**, pursuant to Sections 1, 4(i), 5(c), 405, and 623(l)(1)(D) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 405, 543(l)(1)(D), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, that the Application for Review filed by the City of Boston, Massachusetts, **IS DENIED**.

20. **IT IS FURTHER ORDERED** that the stay filed by the City of Boston is **DISMISSED** as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary